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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11 CALVIN MALONE, GEORGE O  
12 MITCHELL, DARREN PERKINS,  
13 DARRELL KENT,

14                  Plaintiffs,

15                  v.

16                  WASHINGTON STATE, et al.,

17                  Defendants.

18                  CASE NO. 3:14-CV-05974-RBL-JRC

19                  REPORT AND RECOMMENDATION

20                  NOTED FOR: DECEMBER 11, 2015

21                  The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States

22 Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local

23 Magistrate Judge Rules MJR1, MJR3 and MJR4.

24                  Plaintiffs are civilly committed to the Special Commitment Center (“SCC”) in Pierce  
County, Washington and allege that defendant Becky Denny violated their First Amendment  
right to access to the courts because the SCC law library is inadequate. Dkts. 51, 66. Defendant  
Denny’s motion to dismiss contends that plaintiffs failed to state a claim. Dkt. 80.

1 The undersigned recommends that defendant Denny's motion to dismiss be granted.

2 Plaintiffs failed to allege that they suffered actual injury as a result of the alleged deficiencies in  
3 legal resources at the SCC and also failed to allege that defendant Denny personally participated  
4 in the alleged constitutional violation. Thus, plaintiffs have failed to state a claim that defendant  
5 Denny violated plaintiffs' right to access to the courts. However, the Court recommends that  
6 plaintiffs be granted leave to amend their complaint.

7 **PROCEDURAL HISTORY**

8 On December 11, 2014, plaintiffs filed their complaint and paid their filing fee. *See* Dkt.

9 1. On January 6, 2015, plaintiffs filed a first amended complaint. *See* Dkt. 3. Thereafter,  
10 defendants John Clayton, Holly Coryell, Todd Dubble, Bob Ferguson, Cathi Harris, Crystal  
11 McCabe, Kevin W Quigley, Richard Steinbach, Mark Strong, Leslie Sziebert, Washington State,  
12 Washington State Attorney General's Office, Washington State Department of Social and Health  
13 Services, Washington State Special Commitment Center, Christine Gregoire, Teamsters Local  
14 Union 117, Washington Department of Corrections, and Washington Federation of State  
15 Employees filed five motions to dismiss. Dkts. 8, 12, 24, 26, 28. The undersigned issued a  
16 Report and Recommendation recommending that two of the five motions to dismiss be granted.  
17 *See* Dkt. 45; Dkt. 8 (motion to dismiss filed by defendant Teamsters Union Local 117); Dkt. 12  
18 (motion to dismiss filed by defendant Washington Federation of State Employees). The  
19 undersigned also recommended that plaintiffs be allowed to file a second amended complaint,  
20 and therefore, the three remaining motions were stricken. *See* Dkt. 45. Plaintiffs filed a proposed  
21 amended complaint ("second amended complaint") on April 23, 2015. Dkt. 51. Subsequent to  
22 the Court's order adopting the report and recommendation, which granted plaintiffs' motion to  
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1 amend complaint within 21 days, plaintiffs did not re-file their proposed amended complaint or a  
2 new amended complaint. *See* Dkt. 62.

3 Defendants John Clayton, Holly Coryell, Todd Dubble, Bob Ferguson, Christine  
4 Gregoire, Cathi Harris, Crystal McCabe, Kevin W. Quigley, Richard Steinbach, Mark Strong,  
5 Leslie Sziebert filed a motion to dismiss on May 20, 2015. Dkt. 64. Plaintiffs filed a third  
6 amended complaint against defendants John Clayton, Holly (Holley) Coryell, Todd Dubble, Bob  
7 Ferguson, Christine Gregoire, Cathi Harris, Crystal McCabe, Kevin W Quigley, Richard  
8 Steinbach, Mark Strong, Leslie Sziebert, Becky Denny, Jane Doe, and John Doe on May 28,  
9 2015. Dkt. 66. Plaintiffs filed a response to defendants' motion to dismiss on June 4, 2015 (Dkt.  
10 68) and defendants filed a reply on June 11, 2015 (Dkt. 69). Plaintiffs filed a second response on  
11 June 19, 2015. Dkt. 70.

12 A report and recommendation is currently pending on defendants John Clayton, Holly  
13 Coryell, Todd Dubble, Bob Ferguson, Christine Gregoire, Cathi Harris, Crystal McCabe, Kevin  
14 W. Quigley, Richard Steinbach, Leslie Sziebert and Mark Strong's motion to dismiss in which  
15 the Court recommended dismissal of the following claims: (1) unreasonable exposure to ETS  
16 against defendants Ferguson, Gregoire, Coryell, John Doe and Jane Doe; (2) violation of  
17 plaintiffs' right to access to the courts against all named defendants properly served at the time of  
18 the report and recommendation and (3) violation of plaintiffs' right to the grievance process. The  
19 Court recommended that defendants' motion to dismiss be denied with respect to plaintiffs'  
20 claim of unreasonable exposure to ETS against defendants Quigley, Clayton, Strong, Dubble,  
21 Steinbach, Sziebert, Harris and McCabe. Dkt. 71. The Court, however, permitted plaintiffs to  
22 effectuate service on defendant Denny. Dkt. 71 at 22-25. Plaintiffs perfected service. Dkt. 76.

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1 Now before the Court is defendant Denny's motion to dismiss for failure to state a claim.  
 2 Dkt. 80. Plaintiffs filed a response. Dkt. 82. Defendant Denny filed a reply. Dkt. 83.

3 **STANDARD OF REVIEW**

4 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) provides that a court should dismiss  
 5 a claim pursuant to Fed. R. Civ. P. 12(b)(6) either because of the lack of a cognizable legal  
 6 theory or because of the absence of sufficient facts alleged under a cognizable legal theory. See  
 7 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

8 For purposes of ruling on this motion, material allegations in the complaint are taken as  
 9 admitted and the complaint is construed in plaintiffs' favor. *Keniston v. Roberts*, 717 F.2d 1295,  
 10 1300 (9th Cir. 1983). "While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to  
 11 dismiss does not need detailed factual allegations, plaintiffs' obligation to provide the grounds  
 12 for entitlement to relief requires more than labels and conclusions, and a formulaic recitation of  
 13 the elements of a cause of action will not do." *Twombly*, 550 U.S. 544, 545 (2007) (internal  
 14 citations omitted). "Factual allegations must be enough to raise a right to relief above the  
 15 speculative level, on the assumption that all the allegations in the complaint are true (even if  
 16 doubtful in fact)." *Id.* at 545. Plaintiff must allege "enough facts to state a claim to relief that is  
 17 plausible on its face." *Id.* at 570. The Court liberally construes a pro se pleading but cannot  
 18 supply facts to a complaint. *Pena v. Gardner*, 976 F.2d 469 (9th Cir. 1992).

19 **MULTIPLE COMPLAINTS**

20 With respect to whether plaintiff's second or third amended complaint is operative, the  
 21 Court construes plaintiffs' pro se pleadings liberally and in plaintiffs' favor. *Keniston v. Roberts*,  
 22 717 F.2d 1295, 1300 (9th Cir. 1983); *Pena v. Gardner*, 976 F.2d 469 (9th Cir. 1992). Plaintiffs  
 23 filed their proposed second amended complaint prior to the Court's order adopting the report and  
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1 recommendation. *See* Dkt. 51. Plaintiffs then filed their third amended complaint. Dkt. 66. For  
2 purposes of ruling on this motion, the undersigned assumes that the material allegations in  
3 plaintiffs' second and third amended complaints should be taken as admitted and construed in  
4 plaintiffs' favor.

5 **FACTUAL SUMMARY**

6 Plaintiffs are four residents of the SCC -- Calvin Malone, George Mitchell, Darren  
7 Perkins and Darrell Kent. Dkt. 51 ¶¶1.1-1.2; Dkt. 66 ¶ 1.1-1.2. Plaintiffs allege that defendant  
8 Denny manages the SCC's legal affairs and that she is "responsible for ordering legal reference  
9 material, and updating all legal resources ...," and that defendant Denny failed "to assure  
10 Plaintiffs' [sic] had proper access" to the courts. Dkt. 66 ¶ 4.13.

11 Plaintiffs describe the deficiencies of the law library in detail, alleging that many legal  
12 books are missing, legal books and litigation manuals are out of date, there are no federal forms,  
13 several books can only be used inside the libraries, computers have not been updated properly,  
14 case law and other pertinent information is missing, and some units do not have legal computers.  
15 Dkt. 51 ¶ 5.50; Dkt. 66 ¶ 5.46-5.47. Plaintiffs allege that they were unable to review case law in  
16 defendants' first motion to dismiss because the cases could not be found. *Id.* When plaintiffs  
17 raised this issue in "their motion" printouts of the cases appeared, legal computers were replaced  
18 and case law was updated. *Id.*

19 **DISCUSSION**

20 To state a claim under 42 U.S.C. § 1983, the following elements must be met: (1)  
21 defendant must be a person acting under the color of state law; (2) the person's conduct must  
22 have deprived plaintiff of rights, privileges or immunities secured by the constitution or laws of  
23 the United States, *Parratt v. Taylor*, 451 U.S. 527, 535, (1981) (overruled in part on other  
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1 grounds); *Daniels v. Williams*, 474 U.S. 327, 330-31, (1986); and (3) causation. See *Mt. Healthy*  
 2 *City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87, (1977); *Flores v. Pierce*, 617 F.2d  
 3 1386, 1390-91 (9th Cir. 1980), cert. denied, 449 U.S. 875, (1980). When a plaintiff fails to  
 4 allege or establish one of the three elements, his complaint must be dismissed. Vague and  
 5 conclusory allegations of official participation in civil rights violations are not sufficient to  
 6 withstand a motion to dismiss. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992).

7 As an initial matter, plaintiffs sue defendant Denny in both her personal and official  
 8 capacities. Dkt. 66 ¶ 4.13. Absent a waiver of sovereign immunity, state officials in their official  
 9 capacities are not subject to suits seeking damages in federal court under 42 U.S.C. § 1983. *Will*  
 10 *v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The State of Washington has made no  
 11 such waiver. *Rains v. State*, 100 Wn.2d 660, 668, 674 P.2d 165 (1983). Therefore, to the extent  
 12 that plaintiffs seek to sue defendant Denny in her official capacity for money damages, the  
 13 Eleventh Amendment bars those claims. *Pennhurst*, 465 U.S. at 120. Therefore, the Court  
 14 recommends that all claims against defendant Denny in her official capacity be dismissed.

15 As to plaintiffs' claims against defendant Denny in her personal capacity, plaintiffs  
 16 contend that defendant Denny's conduct violated their right to access to the courts. See Dkts. 51,  
 17 66. Defendant Denny contends that plaintiffs do not allege any actual injury. Dkt. 80 at 4-5.

18 Prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S.  
 19 817, 821 (1977); *Lewis v. Casey*, 518 U.S. 343, 346 (1996). This right of access to courts is also  
 20 guaranteed to individuals who are involuntarily committed to a mental institution. *Cornett v.*  
 21 *Donovan*, 51 F.3d 894, 897 (9th Cir. 1995), as amended (May 23, 1995) (citing *King v. Atiyeh*,  
 22 814 F.2d 565, 568 n. 2 (9th Cir. 1987)). This right of access to courts helps ensure that the  
 23 unlawfully detained obtain their freedom, and that those lawfully detained have recourse for  
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1 violations of their constitutional rights. *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *Wolff v.*  
 2 *McDonnell*, 418 U.S. 539, 579 (1974). To prevail on a right to access claim, a plaintiff must  
 3 provide sufficient information establishing a “nonfrivolous” or “arguable” underlying claim.  
 4 *Christopher v. Harbury*, 536 U.S. 403, 415 (2002).

5 “[M]eaningful access to the courts is the touchstone,” *id.* at 823, and “the inmate must go  
 6 one step further and demonstrate that the alleged shortcomings in the library or legal assistance  
 7 program hindered his efforts to pursue a legal claim.” *Lewis*, 518 U.S. at 351. Further, “[a]n  
 8 inmate cannot establish relevant actual injury simply by establishing that his prison’s law library  
 9 or legal assistance program is subpar in some theoretical sense.” *Lewis*, 518 U.S. at 351.

10 However, the scope of the right to access to the courts is limited and prisoners only need  
 11 to have the “minimal help necessary” to file legal claims. *Id.* at 360. The right of access to the  
 12 courts does not extend to a right to discover claims or litigate them once filed with a court. *Id.* at  
 13 354-55. Further, the Constitution does not mandate “that prisoners (literate or illiterate) be able  
 14 to conduct generalized research, but only that they be able to *present* their grievances to the  
 15 courts.” *Id.* at 360 (emphasis added); *see also Madrid v. Gomez*, 190 F.3d 990, 995 (9th Cir.  
 16 1999); *Cornett v. Donovan*, 51 F.3d 894, 898 (1995), cert. denied *sub nom Henry v. Caballero*,  
 17 518 U.S. 1033 (1996). *Exmundo v. Kevorkian*, 2009 WL 3416236, \*3 (E.D. Cal. Oct.22, 2009)  
 18 (holding that litigating a case effectively is not a constitutionally protected right, and finding the  
 19 plaintiff did not state an access claim when he alleged he had to secure extensions and speculated  
 20 the outcome of a case may have been different had he been able to litigate more effectively);  
 21 *Ruth v. Glebe*, 2015 WL 5156339, at \*4 (W.D. Wash. May 19, 2015) *report and*  
 22 *recommendation adopted*, No. C14-1388 BHS, 2015 WL 5156362 (W.D. Wash. Sept. 2, 2015).

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1 Plaintiffs must show that they suffered an actual injury due to the defendant Denny's  
2 unconstitutional conduct. *Lewis*, 518 U.S. at 349; *Pena*, 976 F.2d at 471 (Vague and conclusory  
3 allegations of official participation in civil rights violations are not sufficient to withstand a  
4 motion to dismiss). Actual injury requires "actual prejudice with respect to contemplated or  
5 existing litigation." *Nevada Dep't of Corr. v. Greene*, 648 F.3d 1014, 1018 (9th Cir. 2011).

6 Plaintiffs make general allegations that they "experienced serious violations of their  
7 fundamental right to access the courts, directly stemming from the lack of an adequate law  
8 library." Dkt. 66 ¶ 5.46. Plaintiffs allege that they were not able to "properly review case law  
9 cited by the Attorney General's first motions to dismiss because all the cases could not be  
10 found," *id.*, and that specific legal materials are not available in the SCC law library and that the  
11 computers are outdated. *See id.* at ¶ 5.46-5.47, 7.3. However, plaintiffs concede that when they  
12 raised this issue, printouts of the cases appeared, computers were replaced and case law was  
13 updated. *See* Dkt. 51 ¶ 5.50; Dkt. 66 ¶ 5.46-5.47.

14 In their response to defendant Denny's motion to dismiss, plaintiffs allege that the  
15 inadequate SCC law library hindered their efforts to pursue a claim against defendants  
16 "Ferguson, Coryell, Federation of Employees Union, and Teamsters 117" for "failure to satisfy a  
17 technical requirement which, because of the deficiencies in the SCC Legal Law Library system  
18 the Plaintiffs could not have known until they attempted to research their argument and found  
19 cases missing or nonexistent." Dkt. 82 at 6. Plaintiffs do not state what case law they were not  
20 able to review or what "technical requirement" they failed to satisfy. *See id.*

21 Plaintiffs' complaint does not provide specific facts to establish any actual injury; rather,  
22 at best, plaintiffs' allegations that they could not access case law cited by defendants and that the  
23 SCC law library is inadequate only show that they may have been able to better articulate their  
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1 case with specific legal materials. However, this is not sufficient to state a viable access to courts  
2 claim. *See Lewis*, 518 U.S. at 354-55, 360; *see also Madrid*, 190 F.3d at 995; *Exmundo*, 2009  
3 WL 3416236 at \*3. Plaintiffs have failed to plead facts which raise their claim of denial of access  
4 to the courts above the speculative level.

5 The Court notes that although *Lewis* was not decided at the pleading stage, the Supreme  
6 Court stated that plaintiff's general allegations of inadequacies in the prison system, including  
7 failure to provide adequate legal assistance to non-speaking inmates and lockdown prisoners,  
8 *Lewis*, 518 U.S. at 357, may have sufficed to claim injury because on a motion to dismiss, courts  
9 presume that "general allegations embrace those specific facts that are necessary to support the  
10 claim." *Id.* at 358. Nonetheless, *Twombly* changed the pleading requirements 11 years after  
11 *Lewis*. *Twombly* held that "[w]hile a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to  
12 dismiss does not need detailed factual allegations, plaintiffs' obligation to provide the grounds  
13 for entitlement to relief requires more than labels and conclusions, and a formulaic recitation of  
14 the elements of a cause of action will not do." *Twombly*, 550 U.S. at 545.

15 Furthermore, plaintiffs have failed to plead actual injury because actual injury requires a  
16 showing that plaintiffs suffered "actual prejudice with respect to contemplated or existing  
17 litigation." *See Greene*, 648 F.3d at 1018. Plaintiffs allege that they were not able to "properly  
18 review case law cited by the Attorney General's first motions to dismiss because all the cases  
19 could not be found." Dkt. 66 ¶ 5.46. Although plaintiffs' complaint is not entirely clear,  
20 plaintiffs clarify this allegation in their response to defendants' motion to dismiss, alleging that  
21 the inadequate SCC law library hindered their efforts to pursue a claim against defendants  
22 "Ferguson, Coryell, Federation of Employees Union, and Teamsters 117" for "failure to satisfy a  
23 technical requirement which, because of the deficiencies in the SCC Legal Law Library system  
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1 the Plaintiffs could not have known until they attempted to research their argument and found  
 2 cases missing or nonexistent.” Dkt. 82 at 6.

3       The Court interprets plaintiffs’ allegation to contend that plaintiffs were unable to review  
 4 case law cited in three motions to dismiss: (1) motion to dismiss filed by defendants John  
 5 Clayton, Holly Coryell, Todd Dubble, Bob Ferguson, Cathi Harris, Crystal McCabe, Kevin W  
 6 Quigley, Richard Steinbach, Mark Strong, Leslie Sziebert, Washington State, Washington State  
 7 Attorney General’s Office, Washington State Department of Social and Health Services, and  
 8 Washington State Special Commitment Center (Dkt. 26); (2) motion to dismiss filed by  
 9 defendant Teamsters Local Union 117 (Dkt. 8); and (3) motion to dismiss filed by defendant  
 10 Washington Federal of State Employees (Dkt. 12). *See* Dkts. 8, 12, 26.

11       However, the Court’s report and recommendation struck defendants John Clayton, Holly  
 12 Coryell, Todd Dubble, Bob Ferguson, Cathi Harris, Crystal McCabe, Kevin W Quigley, Richard  
 13 Steinbach, Mark Strong, Leslie Sziebert, Washington State, Washington State Attorney General’s  
 14 Office, Washington State Department of Social and Health Services, and Washington State  
 15 Special Commitment Center motions to dismiss (Dkt. 26) as it was not yet ripe for consideration  
 16 and granted plaintiffs’ motion for leave to file a second amended complaint. *See* Dkt. 45. The  
 17 Court’s report and recommendation also advised plaintiffs that they had failed to state a claim  
 18 against defendants Teamsters Union Local 117 and Washington Federation of Employees but  
 19 granted plaintiffs leave to amend their complaint to cure the defects noted by the Court. Dkt. 45  
 20 at 5-7. Plaintiffs failed to raise any further claims against these two dismissed defendants in their  
 21 amended complaints. *See* Dkts. 51, 66.

22       Plaintiffs subsequently amended their complaint twice against defendants Ferguson and  
 23 Coryell, and plaintiffs concede that they had access to the requested case law in both amended  
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1 complaints. *See* Dkt. 51 ¶ 5.50; Dkt. 66 ¶ 5.46-5.47. The remaining defendants then filed a  
2 renewed motion to dismiss plaintiffs' amended complaint, Dkt. 64, and plaintiffs filed two  
3 responses, Dkts. 64, 68. The Court then entered a report and recommendation on defendants John  
4 Clayton, Holly Coryell, Todd Dubble, Bob Ferguson, Cathi Harris, Crystal McCabe, Kevin W  
5 Quigley, Richard Steinbach, Mark Strong, Leslie Sziebert, Washington State, Washington State  
6 Attorney General's Office, Washington State Department of Social and Health Services, and  
7 Washington State Special Commitment Center's motion to dismiss. Dkt. 71.

8 Thus, the Court did not address plaintiffs' allegations against defendants Ferguson and  
9 Coryell until plaintiffs had amended their complaint with access to the case law cited by  
10 defendants. *See id.*; Dkts. 51, 66. Moreover, plaintiffs failed to raise any claims against  
11 dismissed defendants Teamsters Local Union 117 and Washington State Federation of Employee  
12 in their amended complaints. *See* Dkts. 51, 66. Accordingly, plaintiffs have not shown that they  
13 suffered any actual injury or actual prejudice to existing litigation due to their inability to review  
14 case law.

15 Even assuming all material allegations of plaintiffs' complaint as admitted and liberally  
16 construing those allegations in favor of plaintiffs, they can prove no set of facts in support of  
17 their access to courts claim against defendant Denny that would entitle them to relief. Because  
18 plaintiffs have failed to allege any specific and actual injury, and they have failed to state a  
19 denial of access to the courts claim. Plaintiffs only state conclusory allegations and have failed to  
20 put forth more than a "formulaic recitation" of a cause of action. *Twombly*, 550 U.S. at 545.  
21 However, the Court recommends that plaintiffs be afforded an opportunity to amend their  
22 complaint. In order to state a cognizable access to courts claim, plaintiffs need to set forth  
23 specific facts showing that how the inadequacy of the SCC law library caused actual injury.  
24

## CONCLUSION

The undersigned recommends that defendant Denny's motion to dismiss be granted but that plaintiffs be granted leave to amend their complaint to address the deficiencies noted by the Court.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on **December 11, 2015**, as noted in the caption

Entered this 20<sup>th</sup> day November, 2015.

  
J. Richard Creature  
United States Magistrate Judge